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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 894

STATE BOARD OF EQUALIZATION, an agency of the State of California,

Petitioner,

vs.

GENERAL INDUSTRIES, INC., a corporation,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF RESPONDENT IN OPPOSITION

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In the Supreme Court
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OCTOBER TERM, 1958

No. 894

STATE BOARD OF EQUALIZATION, an agency of the State of California,
Petitioner,

vs.

GOUGH INDUSTRIES, INC., a corporation,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the trial court is unreported (R. II, 19-25).[1] The opinion of the California District Court of Appeal for the Third Appellate District was printed in 165 Advance California Appellate Reports

[1] In this brief, references to the record are as follows, e.g.: Record, Part II, page 10: "R. II, 10." References designated "Pet." are to pages of the petition for a writ of certiorari.

722, 332 P.2d 378.[2] The opinion of the Supreme Court of California, unanimously affirming the judgment of the trial court, is reported in 51 Advance California Reports 748, 336 P.2d 161 (R. V).

JURISDICTION

The opinion of the Supreme Court of California was filed March 13, 1959. The petition for a writ of certiorari was filed May 8, 1959. The jurisdiction of this Court is invoked under section 1257(3) of the Judicial Code (28 U.S.C. 1257(3)).

QUESTION PRESENTED

Goods were purchased by corporations operating in Saudi Arabia, from a Los Angeles seller, to be shipped to and used in Saudi Arabia. The goods traveled by truck from Los Angeles to Wilmington (a coastal port some 30 miles south), where they were delivered to an export

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[2]When the California Supreme Court granted a hearing of the case, the opinion of the District Court of Appeal lost all force and effect. As the California Supreme Court has declared the California law on this point (*Knouse v. Nimocks* (1937) 8 Cal.2d 482, 483-484, 66 P.2d 438, 439):

> "The opinion and decision of the District Court of Appeal, by our order of transfer, have become a nullity and are of no force or effect, either as a judgment or as an authoritative statement of any principle of law therein discussed. • • • without some further express act of approval or adoption of said opinion by this court, that opinion and decision are of no more effect as a judgment or as a precedent to be followed in the decision of legal questions that may hereafter arise than if they had not been written."

To the same effect is *Ponce v. Marr* (1956) 47 Cal.2d 159, 161, 301 P.2d 837, 839.

packer who packed them for transoceanic travel and put them aboard ship for Saudi Arabia. All of the contract documents specified the exportation, and all steps in the transportation were carried out without deviation or delay. Passage of title occurred upon delivery to the export packer. The California sales tax law at the time excluded from computation the proceeds of sales which the state was prohibited from taxing under the Constitution or laws of the United States (Cal. Rev. & Tax Code, sec. 6352; Pet. Appendix A, p. 2).[3]

The question thus presented is whether the court below was correct in holding that the sales of these goods were not taxable by the state on the ground that they were sales in the course of export, exempt from state taxation under Article I, section 10, clause 2, of the Constitution of the United States.

The foregoing reveals the inadequacy of the petitioner's statement of the "question presented" (Pet. 2-3). The phrase "prepare the goods for shipment" (Pet. 2) does not describe what was done here; namely, to repack incidental to the change from one form of transportation to another at the waypoint between land and sea transit.

[3]Without changing this provision, in 1955 the California Legislature made specific the exemption of proceeds from sales of goods purchased for use solely outside of California and delivered to a forwarding agent or export packer and actually delivered to a port outside the continental limits of the United States prior to making any use thereof (Cal.Rev. & Tax.Code, sec. 6387, Cal.Stats. 1955, p. 2746; Pet. Appendix A, p. 2).

STATEMENT OF THE CASE

The underlying facts are stipulated (R. II, 9-18; R. VII). Respondent Gough is a California manufacturer and seller of electrical products (R. II, 10). During 1949, Gough sold goods to Arabian American Oil Company and Trans-Arabian Pipe Line Company (collectively called "Purchasers" in this brief) for use in Saudi Arabia (R. II, 11). The essential steps by which the goods made the journey from Los Angeles to Saudi Arabia were these:

The first step was the Purchasers' request for price quotations. These requests, sent to Gough and other suppliers, sought bids based upon export terms (R. II, 12; R. VII, 11):

> "All purchases made by us are strictly for direct export to our scenes of operation in foreign countries, and it is anticipated your quote will show export prices or export discounts applicable * * *.
>
> * * * * *
>
> Landing and receiving conditions in Arabia are such that our export boxing has been developed into a specialized packing requirement; therefore, if you cannot fulfill our specialized packing requirements using your own facilities, please indicate such information on your quotations."

The second step was Gough's quotation of prices with the notation "export packing extra at cost" (R. II, 13; R. VII, 17).

The third step was the Purchasers' submission of an export purchase order (R. VII, 18-21), requiring that the packages be marked "Ras El Misha'ab," the port of entry in Saudi Arabia. The export purchase order stated

that ocean transportation had been arranged for and that proof of export would be furnished (R. VII, 18). It stated a required date of export, a special export license number and contained the following condition (R. VII, 21):

> "The property hereunder is for export and is to be delivered by you directly to a carrier or forwarding agent for shipment to a point outside the United States, in accordance with shipping instructions hereafter to be furnished you."

The fourth step occurred when the goods were ready for delivery. In accordance with the terms of the contract, Purchasers instructed Gough to deliver them "to Trans-Arabian Pipeline Co., Saudi Arabia, c/o Foreign Trade Export Pack. Co., 445 Figueroa St., Wilmington, Calif. for export packing & forwarding" (R. VII, 22).

It was stipulated that (R. II, 11):

> "Special packing and crating of the electrical products were required to protect them against moisture, humidity, dust, dirt, corrosion and shock during the course of the overseas shipment."

Hence the geography of the transaction was as follows: the goods were scheduled to start from Los Angeles overland to Wilmington, where they would be packed for overseas shipment and forwarded by the export packer to the ship for the remainder of the journey overseas.

Gough started the shipment from Los Angeles as directed, by delivering the goods to a truck carrier in accordance with the shipping instructions (R. II, 14). The truck carrier transported them to Foreign Trade Export Packing Company (called "export packer" in this brief)

which specially packed and crated them for overseas shipment according to the Purchasers' specifications (R. II, 14-16). When the products were packed Purchasers notified the export packer to forward them "to Trans-Arabian Pipeline Co., Ras El Misha'ab, Saudi Arabia, C/ Isthmian SS Co. * * * for Thomas Sim Lee. For export" (R. VII, 26). The ocean carrier received the goods from a truck carrier and delivered them to Saudi Arabia (R. II, 15-16).

Gough paid no sales tax on the transactions as they occurred. After paying the tax pursuant to an assessed deficiency, Gough filed a timely claim for refund which was denied (R. II, 16-17).

From these facts the trial court specifically found that the export journey started when the goods left the seller's plant in Los Angeles; that it was a continuous journey from Los Angeles to Saudi Arabia; that there was no stoppage in transitu or attempt to cause one, or any delay for an unreasonable length of time; that any delay (if any there were) did not break the continuous stream of foreign commerce; and that all packing and crating by the export packer was an incidental part of the total export journey rather than the primary station of commencement of the journey to Saudi Arabia (R. II, 28, 30, 33; R. V, 5-6, Pet. Appendix B, p. 6).[4]

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[4] It is not correct, as petitioner argued below and seems to suggest here (Pet. 3, n. 1) that these findings were not binding on appeal. Under California law the findings of fact, "unless the facts stipulated cannot by any reasonable inference support the conclusion reached by the trial court," are binding on appeal (*Crisman v. Lanterman* (1906) 149 Cal. 647, 655, 87 Pac. 89, 92). The California Supreme Court accepted them as controlling (R. V, 5-6, Pet. Appendix B, p. 6).

On the basis of the facts found, the trial court concluded that the sales in question were exempt from state taxation under the Federal Constitution, and that plaintiff was entitled to judgment (R. II, 34).

The Supreme Court of California, having taken the case over after decision by the District Court of Appeal, unanimously affirmed.

ARGUMENT

FIRST: THE QUESTION IS STRICTLY ONE OF FACT. THE STARTING AND ENDING POINTS OF THE JOURNEY AND ITS CONTINUITY, AND THE INCIDENTAL CHARACTER OF ALL INTERMEDIATE EVENTS, HAVE BEEN FOUND AGAINST THE PETITIONER. ON THE STIPULATED FACTS, THE JUDGMENT BELOW IS CLEARLY CORRECT.

This Court has consistently held that a state tax cannot be imposed upon a sale which is a step in the exportation of goods:

Spalding & Bros. v. Edwards (1923) 262 U.S. 66;
Richfield Oil Corp. v. State Board (1946) 329 U.S. 69.

Where this Court has upheld a state tax in related circumstances, it has always appeared either that the exportation had not yet begun, or that the export journey had been interrupted for some business purpose or some unreasonable delay independent of the transportation of the goods. We know of no case upholding such a tax where, as here, the movement of the goods from the point of origin to the foreign destination had started, and where there was no act or transaction or delay in the course of

the journey which was not incidental or necessary to the transportation of the goods itself.

In this case:

1. The sale transaction was integrated with exportation. Every single act and document related expressly to the transportation of the goods from the point of origin in Los Angeles to their destination in Saudi Arabia. The export purchase order contractually committed the goods to export, setting forth the terms of export, the foreign port of destination, the required date of export, export license numbers, and instructions for delivery to a carrier or forwarding agent for shipment to a point outside the United States (R. VII, 21). A truck carrier forwarded the goods to the export packer, who, after performing the necessary export packing, forwarded them by truck carrier to the ocean carrier (R. II, 14-16). The ocean carrier transported the goods to Saudi Arabia (R. II, 16).

2. From the beginning, the goods were committed to go all the way from Los Angeles to Saudi Arabia. In the words of Justice Holmes (*Spalding & Bros. v. Edwards*, supra, 262 U.S. 66, 68):

> "The transaction from start to finish was understood and intended by the [seller and buyer] to be for the purpose of exporting the goods . . ."

From all the documents and from every act touching the goods, "the certainty of the foreign destination is plain" (*Richfield Oil Corp. v. State Board*, supra, 329 U.S. 69, 83).

3. The movement of the goods had actually started when the tax was sought to be imposed. Exportation is

essentially a journey. The goods had to be transported from Los Angeles to Saudi Arabia, partly by land, partly by sea. Here the journey began when respondent delivered the goods to the truck carrier. Again in the words of Justice Holmes *(Spalding & Bros. v. Edwards,* supra, 262 U.S. 66, 69-70):

> "The expected and accomplished effect of the act was to start them for that port. The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result."

The goods entered the flow of foreign commerce when they left respondent's plant. As *Louisiana R. R. Comm. v. Tex. & Pac. Ry.* (1913) 229 U.S. 336 (cited in the *Spalding* case) states (p. 341):

> "• • • it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another State or to a foreign country."

4. The journey was continuous, unbroken by any action or delay taken for a purpose independent of the transportation of the goods.

The practical continuity of a journey, the interruption or noninterruption of it, the purposes and intentions of incidental events, and the reasonableness or unreasonableness of delays in consideration of the type of journey involved—these are all questions of fact. The trial court found as facts that the journey was continuous from Los Angeles to Saudi Arabia, that the intermediate handling of the goods was incidental to the journey, and that there was no stoppage in transitu or unreasonable delay.

The law does not contemplate, obviously, that the goods must be in motion at every moment of the journey.

Champlain Co. v. Brattleboro (1922) 260 U.S. 366, 376.

Nor does intermediate handling which is incidental to the transportation, or change of the mode or means of transportation, break the continuity of an otherwise continuous journey, so as to cause loss of the constitutional immunity.

Hughes Bros. Co. v. Minnesota (1926) 272 U.S. 469, 475.

Likewise, a single journey of goods is not broken by interruption occasioned solely to promote their safe or convenient transit.

Champlain Co. v. Brattleboro, supra, 260 U.S. 366, 376.

The services of the export packer at the point of transshipment at Wilmington could not by any stretch of the facts be considered as independent of the safe forwarding of the goods on the ocean part of their total journey; safe packaging is not only incidental but necessary to export.

Almy v. State of California (1860) 24 How. (65 U.S.) 169, 173-174.

The purchasers did not delay the goods for any purpose other than safe transportation; indeed, the packing specifications state that the goods were urgently needed and that it was of paramount importance that they arrive in an undamaged condition (R. VII, p. 13). The only concern of the purchasers in having the goods go to the export

packer at all was the safe transportation of the goods; it was immaterial to the purchasers whether they were delivered to the ship already packed or to the export packer for packing and then to the ship (R. VII, p. 12).

A physical interruption in the course of export will remove constitutional immunity only if the interruption serves some business purpose *apart from* the necessities of transportation.

Carson Petroleum Co. v. Vial (1929) 279 U.S. 95, 104-109;

General Oil Co. v. Crain (1908) 209 U.S. 211, 231.

The petitioner's theory, in the face of the foregoing and plainly logical alignment of authorities, comes down to the proposition that the state is free to tax until the goods are delivered to the carrier which finally carries them outside the national boundary, despite the fact that they have already traveled to the coastal port by another carrier as part of the continuous journey from the point of origin to the point of destination. This proposition is at war with the *Hughes Bros. Co.* and *Carson Petroleum* cases, supra, as well as with practical business reality.

SECOND: THE DECISION BELOW PRESENTS NO CONFLICT WITH ANY DECISION OF THIS COURT, OR WITH THE DECISION OF THE WASHINGTON SUPREME COURT QUOTED BY PETITIONER.

The case of *Empresa Siderurgica v. Merced Co.* (1949) 337 U.S. 154, upon which petitioner primarily relies (Pet. 6-8), presents a fundamentally different situation. This Court there upheld a property tax on various parts of a

cement plant which had been sold for dismantling and shipping to South America. (No tax was levied on part that had already gone.) On (1) parts that were crated and ready for shipment, (2) parts dismantled but not yet packed, and (3) parts not yet dismantled, this Court upheld the tax. Though it may have been true that all the parts on which the tax was levied were, to all practical purposes, committed to export, one critical test was not met. The movement of the goods had not started. In the case at bar, it had.

Nor has the case of *Coe v. Errol* (1886) 116 U.S. 517 (Pet. 9) any force in the circumstances at bar. Logs were floated down a river in Maine. The taxpayers and owners stopped the logs while in Maine for "about a year" (p. 519), and there the logs remained "until it should be *convenient* to send them to their destination" in New Hampshire (p. 528) (emphasis added). On the tax date, which fell before the logs commenced the journey to New Hampshire, the logs were held to be a part of the taxpayer's property in Maine. The taxpayer there chose, for reasons of his own convenience, to split a single interstate journey into two widely separated and essentially disconnected journeys.

In *Coe v. Errol* the logs could have and, but for the taxpayer's convenience, would have floated in one continuous journey. *Coe v. Errol* should be contrasted with the facts of the present case and with the facts of *Hughes Bros. Co. v. Minnesota* (1926) 272 U.S. 469, and *Champlain Co. v. Brattleboro* (1922) 260 U.S. 366.

Petitioner's agglomeration of other cases (Pet. 9-10) serves no useful purpose: *Cornell v. Coyne* (1904) 192

U.S. 418, involved a cheese *manufacturing* tax. *Heisler v. Thomas Colliery Co.* (1922) 260 U.S. 245, was like the *Empresa* case; the goods had not started in transit. *Federal Compress Co. v. McLean* (1934) 291 U.S. 17, involved a license tax on the business of baling cotton. *Diamond Match Co. v. Ontonagon* (1903) 188 U.S. 82, is simply another *Coe v. Errol.*

Petitioner's final effort to produce a conflict by reprinting the decision of the Supreme Court of Washington in *Eardley Fisheries Company, Inc. v. City of Seattle* (1957) 50 Wash.2d 566, 314 P.2d 393 (Pet. Appendix E, pp. 25-31) is equally farfetched. In that case the United States purchased seafood for army use abroad, none of which, however, appears to have been purchased for a specific destination or a specific export transit. Upon being purchased by the Government, it was quick-frozen, and then was "kept in storage and stock-piled for variable periods of time (from ninety to one hundred twenty days)." Thereafter, "*Upon requisition* by the overseas units of the United States, and the arrival of vessels having sufficient refrigeration facilities" (50 Wash.2d 567, 314 P.2d 394, Pet. Appendix E, p. 26) (emphasis added), the goods were transported abroad. "[S]imilar items, so packed, stored and purchased from appellant, were domestically consumed" (50 Wash.2d 571, 314 P.2d 396, Pet. Appendix E, p. 30).

THIRD: NO IMPORTANT OR RECURRING QUESTION IS PRESENTED.

No important or recurring question is presented, as the petition notes (Pet. 11). The California Legislature has now made the exemption specific (Cal.Rev.& Tax.Code, sec. 6387, Cal.Stats. 1955, p. 2746; supra, p. 3, n.3). Since approximately four years ago, the issue has been a dead one. The effort of the petitioner to raise questions wholly extraneous to the facts here (e.g., painting, repairing, renovation, etc.—Pet. 11) presents no justiciable issue for this Court.

CONCLUSION

The decision below is clearly correct. It accords with the prior decisions of this Court. We respectfully submit that the petition for certiorari should be denied.

Dated: San Francisco, California, May 18, 1959.

Respectfully submitted,

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